

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

CLAYTON E. BUTSCH,

CASE NO. C24-0482JLR-BAT

Petitioner,

## ORDER ADOPTING REPORT AND RECOMMENDATION

JASON BENNETT,

## Respondent.

## I. INTRODUCTION

Before the court is Magistrate Judge Brian A. Tsuchida’s report and recommendation, in which he recommends dismissal of *pro se* Petitioner Clayton E. Butsch’s 28 U.S.C. § 2241 petition for a writ of habeas corpus. (R&R (Dkt. # 13).) The court construes the two motions Mr. Butsch filed on April 30, 2024, as together constituting Mr. Butsch’s objections to the report and recommendation. (Obj. 1 (Dkt. # 17); Obj. 2 (Dkt. # 18).) The court has considered the report and recommendation, Mr. Butsch’s objections, the relevant portions of the record, and the governing law. Being

1 fully advised, the court ADOPTS Magistrate Judge Tsuchida's report and  
2 recommendation and DISMISSES Mr. Butsch's petition without leave to amend.

3 **II. BACKGROUND**

4 The court ADOPTS in full the background set forth in the report and  
5 recommendation. (See R&R at 1-5.)

6 On April 10, 2024, Mr. Butsch filed a proposed § 2241 petition and motion for  
7 leave to proceed *in forma pauperis* ("IFP"). (IFP Mot. (Dkt. # 1).) On April 15, 2024,  
8 Magistrate Judge Tsuchida filed a report and recommendation recommending denial of  
9 Mr. Butsch's IFP motion because his prison trust account showed that he could pay the  
10 \$5.00 filing fee. (IFP R&R (Dkt. # 4).) The court adopted the report and  
11 recommendation on April 16, 2024. (4/16/24 Order (Dkt. # 5).) On April 24, 2024, Mr.  
12 Butsch paid the filing fee and filed two additional motions: (1) a motion to grant his first  
13 motion to proceed IFP and (2) a "motion to waive Magistrate Judge." (See 4/24/24 Dkt.  
14 Entry; 2d IFP Mot. (Dkt. # 6); Waiver Mot. (Dkt. # 7).) On April 25, 2024, the court  
15 construed Mr. Butsch's motions together as a motion for reconsideration of the April 16,  
16 2024 order, denied the motion, and referred the matter to Magistrate Judge Tsuchida for  
17 further proceedings. (4/25/24 Order (Dkt. # 12).)

18 Magistrate Judge Tsuchida filed his report and recommendation on April 26, 2024.  
19 (R&R.) Mr. Butsch filed his objections on April 30, 2024. (Obj. 1; Obj. 2.) On May 3,  
20 2024, Mr. Butsch filed a notice of appeal of the report and recommendation and a request  
21 for a certificate of appealability. (NOA (Dkt. # 19).) Because a report and  
22 recommendation is not an appealable order, Mr. Butsch's premature notice of appeal does

1 not divest this court of jurisdiction over this matter. *See Burnside v. Jacquez*, 731 F.3d  
2 874, 875 (9th Cir. 2013) (“A notice of appeal from a magistrate judge’s report and  
3 recommendation is ineffective.”); (*see also* R&R at 12 (instructing Mr. Butsch that he  
4 “should not file a notice of appeal seeking review in the Court of Appeals for the Ninth  
5 Circuit until the assigned District Judge enters a judgment in the case”)). Therefore, the  
6 court proceeds below to evaluate the report and recommendation and Mr. Butsch’s  
7 objections thereto.

8 **III. ANALYSIS**

9 A district court has jurisdiction to review a magistrate judge’s report and  
10 recommendation on dispositive matters. Fed. R. Civ. P. 72(b). “A judge of the court  
11 may accept, reject, or modify, in whole or in part, the findings or recommendations made  
12 by the magistrate judge.” 28 U.S.C. § 636(b)(1)(C). “The statute makes it clear that the  
13 district judge must review the magistrate judge’s findings and recommendations *de novo*  
14 if objection is made, but not otherwise.” *United States v. Reyna-Tapia*, 328 F.3d 1114,  
15 1121 (9th Cir. 2003) (en banc). Because Mr. Butsch is proceeding *pro se*, the court must  
16 interpret his petition and objections liberally. *See Bernhardt v. Los Angeles Cnty.*, 339  
17 F.3d 920, 925 (9th Cir. 2003).

18 Magistrate Judge Tsuchida recommends, correctly, that the court construe Mr.  
19 Butsch’s purported § 2241 habeas petition as a § 2254 petition. (R&R at 5-6 (citing  
20 *Dominguez v. Kernan*, 906 F.3d 1127, 1135 (9th Cir. 2018) (explaining that § 2254 is  
21 “the exclusive vehicle for a habeas petition by a state prisoner in custody pursuant to a  
22

1 state court judgment,” while § 2241 is “available for challenges by a state prisoner who is  
2 not in custody pursuant to a state court judgment” (internal citations omitted))).)  
3 Magistrate Judge Tsuchida recommends dismissing the petition because it (1) is  
4 time-barred; (2) is a second or successive request for relief over which the court lacks  
5 jurisdiction under 28 U.S.C. § 2244(b); (3) requests relief the court cannot grant; and  
6 (4) is untimely or precluded to the extent Mr. Butsch raises civil rights claims under  
7 42 U.S.C. § 1983. (See R&R at 5-11. )

8 Mr. Butsch makes two objections. First, he asks the court “to apply *Cone v. Bell*,  
9 556 U.S. 449, 472 (2009), to his 2241 petition.” (Obj. 1.) He cites *Cone* for the principle  
10 that “[a]ny federally reviewable claim that was not adjudicated on the merits in state  
11 court is reviewed de novo[.]” (*Id.*) He also points the court to *Williams v. Taylor*, 529  
12 U.S. 362, 391 (2000), “so there won’t be an analysis that is (1) not only ‘contrary to,’ or  
13 ‘involve an unreasonable application of . . .’ clearly established federal law as determined  
14 by the United States Supreme Court.” (Obj. 1.) Second, Mr. Butsch asks the court “to  
15 apply *Ornelas v. United States*, 517 U.S. 690[, 696-97] (1996), to his arrest warrant.”  
16 (Obj. 2.) He goes on to say that “[t]he first part of the analysis involves only a  
17 determination of historical facts, but the second is a mixed question of law and fact, also  
18 pursuant to [*Williams*], so there won’t be an analysis that is (1) not only ‘contrary to,’ or  
19 ‘involve an unreasonable application of . . .’ clearly established federal law as  
20 determined by the United States Supreme Court.” (*Id.*) Mr. Butsch, however, does not  
21 identify which portions of the report and recommendation he is challenging, nor does he  
22 explain how the application of *Cone* and *Ornelas* would affect the court’s review. (See

1 *generally* Obj. 1; Obj. 2.) Indeed, neither *Cone* nor *Ornelas* addresses the timeliness and  
 2 procedural deficiencies discussed in the report and recommendation. Thus, having  
 3 reviewed Magistrate Judge Tsuchida's report and recommendation de novo, the court  
 4 independently agrees with the analysis set forth therein and ADOPTS the report and  
 5 recommendation in its entirety.

6 **IV. CONCLUSION**

7 For the foregoing reasons, the court ORDERS as follows:

- 8 1. The court ADOPTS the report and recommendation (Dkt. # 13) and  
 9 DISMISSES Mr. Butsch's habeas petition (Dkt. # 9) without leave to amend;
- 10 2. The court DENIES issuance of a certificate of appealability for the reasons  
 11 set forth in the report and recommendation;
- 12 3. The court STRIKES Mr. Butsch's motion requesting judicial notice (Dkt.  
 13 # 10) and motion to certify (Dkt. # 11<sup>1</sup>) as moot; and
- 14 4. The court DIRECTS the Clerk to send copies of the order to Mr. Butsch  
 15 and Magistrate Judge Tsuchida.

16 Dated this 13th day of May, 2024.

17   
 18 \_\_\_\_\_

19 JAMES L. ROBART  
 20 United States District Judge

21 <sup>1</sup> Although the docket refers to this document as a motion to certify, the document  
 22 appears to be a second copy of the motion requesting judicial notice. (Compare Dkt. # 10, with  
 Dkt. # 11.)